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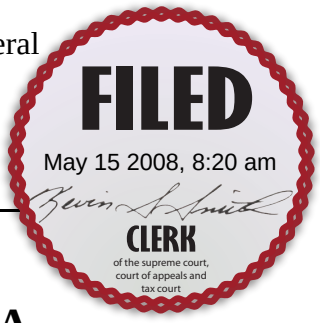

IN THE COURT OF APPEALS OF INDIANA

DAVID BURKS-BEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0708-CR-741
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0608-FA-13

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David Burks-Bey pleaded guilty to Possession of Cocaine,[1] a class B felony. On appeal, he presents the following restated issues for review:

1. Was Burks-Bey denied his right to a speedy trial?

2. Did Burks-Bey knowingly and intelligently waive his right to a speedy trial by pleading guilty?

3. Did the trial court abuse its discretion by denying Burks-Bey's motion to withdraw his guilty plea?

We affirm.

The State charged Burks-Bey with conspiracy to commit dealing in cocaine, a class A felony, dealing in cocaine, a class A felony, and possession of cocaine, a class B felony. At his initial hearing on September 7, 2006, Burks-Bey advised the court that he intended to represent himself. The court appointed a public defender as stand-by counsel and set a jury trial for January 30, 2007.

In October, Burks-Bey began filing a number of pro se motions and letters with the trial court.[2] On October 11, 2006, he filed a Motion for Immediate Dismissal with Prejudice and Affidavit of David M. Burks-Bey. On October 18, Burks-Bey then filed "Plaintiff's Avernment of Jurisdiction to the Status of Moorish America, and Order for in Written Personam, and Temporary Restraining Order." *Appellant's Appendix* at 5. That same day, he filed another Motion for Immediate Dismissal with Prejudice, as well as a Motion for Discovery with letter and request for CCS. Per his request, a copy of the CCS

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[1] Ind. Code Ann. § 35-48-4-6 (West, PREMISE through 2007 1st Regular Sess.).

[2] The majority of these motions and letters were not included in the record for our review. Therefore, we must rely on the information listed in the Chronological Case Summary (the CCS).

was sent to Burkes-Bey. Thereafter, on October 23, the trial court denied all of Burks-Bey's pending motions. Two days later, however, the court ordered that at least one of the motions for immediate dismissal would be treated as a motion to suppress and scheduled a hearing on said motion. Prior to the hearing, Burks-Bey filed a memorandum of law in support of the motion. Thereafter, he filed several letters with the trial court, as well as a Motion for Default Judgment. A hearing was held on the motion to suppress, as well as the other pending matters, on January 10, 2007. The trial court denied the motion to suppress that same day.

On January 17, Burks-Bey again filed a number of items with the trial court, including a Motion for Order Compelling Discovery, a Request for Production of Documents, and a 1983 Prisoner Complaint. In his 1983 Prisoner Complaint (the 1983 complaint) against the Tippecanoe County Jail and certain jail employees, Burks-Bey alleged in part:

> a) The plaintiff subsequently on September 07, 2006 prepared his pro se "Motion For A Fast and Speedy Trial" and placed said Motion in an envelope addressed to: the Clerk of Superior Court No. 2. Tippecanoe County Courthouse, 301 Main Street, Lafayette Indiana 47901. Said envelope was identified as "Legal Mail" by the Plaintiff and placed in the care and control of the Defendants for mailing pursuant to I.C. 11-11-7-2.
> b) *However, after receiving a Docket Sheet under Criminal Cause in subsection 8(A) above, dated October 18, 2006.* [sic] *The plaintiff learned that the Defendants did not provide the Plaintiff with indigent postage pursuant to I.C. 11-11-7-2 and as a direct result, the Defendants never mailed the Plaintiffs* [sic] *"Motion For A Speedy Trial" to the Trial Court, causing said Motion to never be filed.* (See: Attachment No. 1)
> c) As a direct result of the Defendants [sic] refusal to comply with IC 11-11-7-1 and 11-11-7-2 via not providing the Plaintiff with indigent postage to forward his "Motion For A Fast And Speedy Trial" to the Trial Court. [sic] *The Plaintiffs* [sic] *"Motion For A Fast And Speedy Trial" was subsequently never filed*; all due to no fault of the plaintiff.

Appellant's Appendix at 57-58 (emphases supplied). The 1983 complaint was the first mention on the record before us of any attempt by Burks-Bey to request a speedy trial. The 1983 complaint, however, makes clear that Burks-Bey learned on or about October 18 (three months earlier) that the trial court had never received his request for a speedy trial, which he allegedly attempted to file on September 7.

As a result of these recent filings, the jury trial scheduled for January 30 was rescheduled to February 7, and the trial court scheduled a hearing to address Burks-Bey's motion for order compelling discovery and request for production of documents. After he sent another letter to the court on January 23, the court scheduled another hearing "on defendant's pro se motion to suppress evidence." *Id*. at 3. On January 29, Burks-Bey moved for a change of plea hearing, which was scheduled by the trial court and then rescheduled after Burks-Bey filed yet another letter.[3]

Burks-Bey and the State entered into a plea agreement on February 27, pursuant to which Burks-Bey pleaded guilty to class B felony possession of cocaine in exchange for a cap on his executed sentence and the dismissal of the two remaining class A felony dealing counts. The court took the plea agreement under advisement. At the conclusion of the plea hearing, the court made the following statement with regard to the 1983 complaint:

> The record will reflect in making the order for today that the defendant tendered certain civil --- tendered the documents by which he intended to commence a civil action and the court informed defendant that this court is

[3] While this letter, like the many others filed by Burks-Bey, is not included in the record, we note that the CCS indicates the court forwarded it to Burks-Bey's standby counsel "for appropriate action." *Id*.

> not the proper place to file such documents and appointed John Sorensen for the limited purposes of assisting the defendant in properly filing his own pro se documents.

Plea Hearing Transcript at 17-18.

On the day of the scheduled sentencing hearing, May 10, 2007, Burks-Bey filed a Motion for Dismissal and Discharge with Prejudice for Speedy Trial Violation, relying upon the motion for speedy trial that he allegedly filed on September 7, 2006, "via placing same in the hands of Tippecanoe County Jail staff". *Appellant's Appendix* at 69. Burks-Bey argued that his guilty plea should not waive the speedy trial issue because he "sincerely believed" filing the 1983 complaint at the commencement of his plea hearing would preserve the issue, which was raised in the complaint. *Id*. at 77. Burks-Bey further claimed that he made "a clear reservation of [his] rights pursuant to section 1-207 of the Uniform Commercial Code" by writing "Without Prejudice U.C.C. 1-207" under his signature on the plea agreement. *Id*. at 77, 65. As a result of Burk-Bey's motion, the court rescheduled the cause for hearing on all pending motions and for sentencing at a later date.

At the sentencing hearing on June 18, the court first addressed the speedy trial issue. The State argued that Burks-Bey had waived the issue by pleading guilty. Burks-Bey responded that he raised the issue and sought discharge in his 1983 complaint, which was presented to the court at the beginning of the plea hearing. The trial court then indicated that the alleged speedy trial motion was never filed with the court and did not appear on the CCS. The court further concluded that even if a speedy trial had been properly requested, his right to a speedy trial had not been violated because the delays in

the case were attributable to Burks-Bey's many motions. Finding that there had not been seventy days attributable to the State, the trial court denied the motion for discharge. Burks-Bey responded with a request for interlocutory appeal of this ruling, which the trial court denied. Burks-Bey then made an oral request to withdraw his guilty plea,[4] which the trial court similarly denied. The court summarized its ruling:

> I will observe that the defendant has filed numerous petitions of one sort or another up to and including those filed today for the first time. And the rule as to speedy trial is that when you have your motion pending it counts against you and not the State. So to the extent that you started filing things --- these things almost immediately upon your charges and they weren't resolved until, you know, shortly before your plea of guilty, the time counts against you and not the State whatever --- whenever your motion for a speedy trial was filed. And further, that the Court's file does not reflect the filling of a motion for a speedy trial at the time you indicate that you filed it. I'm not saying you didn't try, it --- you didn't succeed in getting it filed. As soon as you filed any motion that came to the Court's attention the Court gave it prompt attention. And to the extent that it required a hearing, set it for a hearing. So that's denied.

Sentencing Transcript at 18. The trial court then proceeded with sentencing.

On appeal, Burks-Bey presents us with three interrelated issues. First, he argues that he was denied his right to a speedy trial pursuant to Indiana Criminal Rule 4(B). Second, he contends that he did not knowingly and intelligently waive his right to a speedy trial by executing the plea agreement in which he reserved his right to assert a speedy trial violation. Finally, he argues that the trial court abused its discretion in refusing to allow him to withdraw his plea of guilty where he demonstrated he was denied his right to a speedy trial. The State responds that Burks-Bey waived his speedy

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[4] Ind. Code Ann. § 35-35-1-4 (West 2004) permits a defendant to file a motion to withdraw his guilty plea after its entry but prior to sentencing. The statute, however, requires such a motion to be in writing and verified.

trial claim by pleading guilty and that the trial court properly denied the motion to withdraw his guilty plea.

It is clear from our review of the record that the trial court addressed the merits of Burks-Bey's speedy trial claim, which is at the heart of each of the issues he presents on appeal. While the State's waiver argument is certainly valid, *see Branham v. State*, 813 N.E.2d 809 (Ind. Ct. App. 2004), for ease of analysis and because it was the basis of Burks-Bey's motion to withdraw his guilty plea, we too will reach the merits of the motion for discharge.

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by article 1, § 12 of the Indiana Constitution. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). The provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right by establishing time deadlines by which trials must be held. *Truax v. State*, 856 N.E.2d 116 (Ind. Ct. App. 2006). Specifically, Criminal Rule 4(B)(1) provides, in relevant part:

> If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.

"A defendant must maintain a position reasonably consistent with his request for a speedy trial, and he must object--at the earliest opportunity--to a trial setting that is beyond the seventy-day time period." *Truax v. State*, 856 N.E.2d at 120. In other words, it is the defendant's obligation to call to the trial court's attention a trial date that has been

set outside the time frame allowed by Criminal Rule 4(B) and failure to do so results in abandonment of his request for a speedy trial. *See James v. State*, 622 N.E.2d 1303 (Ind. Ct. App. 1993); *see also Utterback v. State*, 310 N.E.2d 552, 554 (1974) ("when a ruling is made that is incorrect, and the offended party is aware of it, … it is his obligation to call it to the court's attention in time to permit a correction").

In recognizing this obligation, our Supreme Court has noted, "[t]he purpose of the rule[] is to assure early trials and not discharge defendants." *Utterback v. State*, 310 N.E.2d at 553-54. In *Utterback*, our Supreme Court further noted that although "[t]he courts are under legal and moral mandate to protect the constitutional rights of accused persons ... this should not entirely relieve [defendants] from acting reasonably in their own behalf." *Id*. at 554. The right to a speedy trial is not intended to allow defendants a means of escape by abusing the procedures that the courts have designed for their protection. *Utterback v. State*, 310 N.E.2d 552.

In the instant case, we have only Burks-Bey's belated, self-serving statement that he attempted to file his motion for a speedy trial on September 7, 2006 by giving it to jail staff to be mailed. The court's record does not reveal such a filing. Moreover, the 1983 complaint makes clear that Burks-Bey soon discovered, on or about October 18, 2006, that the speedy trial motion never made it to the trial court. Instead of refiling the motion or promptly bringing the error to the trial court's attention, Burks-Bey sat back and did nothing in this regard for months (despite filing numerous other motions and letters with the trial court). In fact, after his discovery of the error, Burks-Bey did not mention his speedy trial request to the trial court until he sought discharge, first indirectly through his

1983 complaint filed in January and then directly through his motion for discharge filed in May. Burks-Bey clearly failed to act reasonably, and we refuse to countenance his apparent attempt to manipulate the process in order to gain discharge. *See id*.

Even if Burks-Bey's speedy trial motion had been properly filed on September 7, he would still not be entitled to discharge. Our Supreme Court has held that when a defendant takes action that delays the proceeding, such time is chargeable to the defendant regardless of whether a trial date has been set. *See Cook v. State*, 810 N.E.2d 1064 (Ind. 2004). Further, a delay attributable to the defendant runs from the time a motion is filed until the court rules on the motion. *Carr v. State*, 790 N.E.2d 599 (Ind. Ct. App. 2003), *disapproved of on other grounds*, *Cook v. State*, 810 N.E.2d 1064. In the instant case, the trial court found that substantial delays were attributable to Burks-Bey by virtue of his numerous pro se motions, which he began filing in October and many of which required hearings.[5] Without recounting the extensive record of pro se filings and related hearings and rulings as set out in detail above, we conclude that the record clearly supports the trial court's finding in this regard. There were not seventy days attributable to the State and Burks-Bey was not entitled to discharge.[6]

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur.

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[5] Of particular delay was his motion for immediate dismissal with prejudice, which the trial court set for hearing and treated as a motion to suppress. The motion to suppress hearing was rescheduled several times due to additional filing by Burks-Bey. Ultimately, the motion accounted for nearly three months of delay.

[6] Our determination that there was no speedy trial violation is dispositive of each of the issues presented on appeal. Therefore, we need not address them individually.